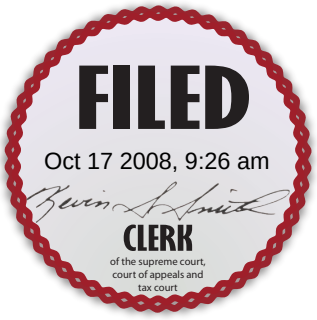

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IN THE
COURT OF APPEALS OF INDIANA

VERNANDO ROSS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0803-CR-134
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0611-MR-219268;
49G05-0511-FC-012608

October 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Vernando Ross appeals his convictions for Murder,[1] a felony, Attempted Murder,[2] a class A felony, and Carrying a Handgun without a License,[3] a class A misdemeanor. He presents the following restated issues for review:

1. Did the State present sufficient evidence to support Ross's conviction for attempted murder?

2. Did the State present sufficient evidence to support the murder conviction?

3. Did the trial court improperly deny Ross's motion for a mistrial?

4. Is Ross's sentence inappropriate?

We affirm.

On the night of November 2, 2006, Lue Moffett was visiting his uncle, Willie Johnson, at Johnson's home on West 28th Street in Indianapolis. Moffett, Johnson, and one of Johnson's female friends (known as "Blondie") were drinking beer and listening to music. Earlier that evening, they had also smoked crack cocaine. Paul Baker, who had been living with Johnson for a few months, became a topic of conversation. Baker and Johnson had apparently not been getting along and Johnson's landlord and friend wanted Baker out of the residence.

While Moffett was at the back of the house using the restroom, Baker and Ross entered the residence. An argument quickly broke out, and Blondie went to alert Moffett. Moffett returned to find Ross waiving a handgun and shouting, "[Y]ou mother fuckers are

[1] Ind. Code Ann. § 35-42-1-1 (West, PREMISE through 2007 1st Regular Sess.).
[2] Ind. Code Ann. § 35-41-5-1 (West 2004); I.C. § 35-42-1-1.
[3] Ind. Code Ann. § 35-47-2-1 (West, PREMISE through 2007 1st Regular Sess.).

going to respect [Baker], do you hear what the fuck I'm saying, I'll shoot you in your goddamn face, you hear what I'm saying?" *Transcript* at 107. As Moffett stepped into the room, Ross turned and said, "[W]ho the fuck is this, get your ass over here, you want some of this shit too?" *Id*. at 108. Moffett put his hands in the air and asked what was going on. Ross responded, "[S]hut your mother fucking ass up, you want me to kill your ass too, get your ass over in that corner [with Johnson.]" *Id*. Moffett did not do as requested, so Ross fired a shot toward Moffett's feet.

Moffett then immediately "rushed [Ross] to the couch" and tried to get the gun from him. *Id*. When the struggle proved unsuccessful, Moffett pushed off of Ross in order to "make for the door". *Id*. at 111. As Moffett pushed off, Ross shot him in the groin. Moffett then stood up, and Ross shot him again, striking him in the right thigh. The shot knocked Moffett to the ground.

As Moffett fell, Johnson tackled Ross.[4] Ross shot his gun two or three more times as he and Johnson struggled. Moffett then ran from the house to call 911, hearing more gunshots as he fled. Johnson ultimately suffered five gunshot wounds. Two of the wounds were fatal, particularly the one that entered his neck and fractured a vertebra. Johnson likely died within five minutes of this shot. Johnson was also shot in the chest, right flank, right hip, and left thigh. Further, there was evidence that he had been kicked in the forehead.

Due to confusion regarding Moffett's description of the location of the shooting, Johnson's body was not discovered until the following morning. His body was found on the

floor in the area he and Ross had been struggling when Moffett fled. Police recovered Ross's cell phone and a necklace, like one commonly worn by Ross, at the scene. Eight .40 caliber shell casings, all fired from the same handgun, and five bullets were also found. Ross was not identified until several days after the shooting.

On the night of the shooting or early the next morning, Ross spoke with his friend, Julian Marshall. Ross had been drinking and was "hyped up". *Id*. at 619. Ross was rambling and repeatedly saying, "m-one, you hear me, I killed and my 40 was spitting." *Id*. at 621. Marshall explained that in street terminology "m-one" means murder and "40" refers to a .40 caliber handgun. Marshall further opined that "spitting" meant the gun was "shooting good." *Id*. at 621. Ross indicated that he went there to tell them to stop disrespecting Baker and things got "hectic" when another individual came out from the back. *Id*. at 624. Ross told Marshall that he shot two men, one in the leg and one in the head or face. Ross explained that after the struggle he was getting ready to leave but then the man (Johnson) tried to get up and Ross shot him in the head or face. Ross said he threw the gun in Eagle Creek Reservoir.[5]

Later that morning, Ross contacted Marshall again. He was "paranoid" and needed to get out of the house. *Id*. at 628. Marshall picked up Ross and drove him around town. One of the stops was Eagle Creek, where Ross wanted to make sure the gun had made it into the water. After another day or two, Ross came to Marshall's house and indicated that he

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[4] Baker stood by and did not enter the fray, though he was apparently struck at some point by one or two stray bullets.

[5] The gun was never recovered by police.

thought the police were on to him. He asked Marshall and Marshall's girlfriend to provide him with a false alibi. Ross was arrested on November 15. Ross called Marshall from jail twenty to thirty times over the next two weeks seeking his help with respect to an alibi and passing a message onto Baker.

Ross was charged with murder, attempted murder, and carrying a handgun without a license. The State also filed a notice of probation violation stemming from a previous conviction for which he was on home detention and probation at the time of the instant offense. Before the jury trial, the trial court granted a motion in limine prohibiting the State from presenting any evidence referring to Ross as "Ghetto Godfather", a term that had appeared on his cell phone records. In compliance with that ruling, the State introduced redacted copies of Ross's cell phone records into evidence.

During closing argument, the State utilized a computer-generated slide show. Two slides in the presentation inadvertently contained unredacted copies of exhibits, both referring once to "Ghetto Godfather." Each slide was displayed for about three to five seconds. Ross objected during the second slide and sought a mistrial. The trial court denied the motion for mistrial and admonished the jury as follows:

> Ladies and gentlemen, sometimes when you're dealing with the newest generations of technology you need to have a good reliable fifth grader around to help you out. That didn't happen here and the last two screens that were on the TV were not copies of the exhibits that were introduced in the trial. I have no idea if you noticed a distinction or not. If you did, don't consider the screens at all. They are of no force and affect. If you hear somebody talking about something that's a distinction, stop them. It's not a subject for deliberation and I don't, in my heart, think that anybody did anything on purpose, but there, it's beyond doubt a mistake was made.

Id. at 1020.

On January 16, 2008, the jury found Ross guilty as set forth above. Thereafter, at the sentencing hearing, Ross stipulated to the probation violation. The trial court ordered the execution of the entire suspended sentence of six years for the probation violation. With respect to the instant convictions, the court imposed consecutive, advisory sentences of fifty-five years for murder and thirty years for attempted murder. The court also imposed a sentence of one year for the handgun offense to be served concurrently with the murder sentence. Ross now appeals.

1.

Ross initially argues the State presented insufficient evidence to support his conviction for attempted murder. Ross claims there was no evidence that he intentionally fired the handgun with the specific intent to kill Moffett. Rather, he asserts the evidence establishes only that the pistol discharged randomly after Moffett rushed him and tried to take the gun away.

We reject Ross's invitation to reweigh the evidence. When considering a challenge to the sufficiency of evidence supporting a conviction, we neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). This review "respects 'the jury's exclusive province to weigh conflicting evidence.'" *Id*. at 126 (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). Considering only the probative evidence and reasonable inferences supporting the judgment, we must affirm "'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a

reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *McHenry v. State*, 820 N.E.2d at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

In a prosecution for attempted murder, the State must prove the defendant had a specific intent to kill. *Kiefer v. State*, 761 N.E.2d 802 (Ind. 2002). " Intent to kill may be inferred from the nature of the attack and the circumstances surrounding the crime." *Id*. at 805. "Additionally, the trier of fact may infer intent to kill from the use of a deadly weapon in a manner likely to cause death or great bodily harm." *Id.*

Our Supreme Court has observed that murder and attempted murder convictions have been overturned "on very rare occasion" on the basis of insufficient evidence of intent to kill. *Id*. at 805. This is not one of those rare occasions. Here, Ross shot Moffett twice as Moffett attempted to disengage from the struggle with Ross. In fact, after Moffett was shot once and rose to his feet, Ross shot him a second time. The jury was entitled to infer from these facts, combined with the prior threat to shoot Moffett, that Ross intended to kill Moffett.

2.

Ross also challenges the sufficiency of the evidence supporting his murder conviction. He claims, "[t]he only evidence of [Ross's] involvement in the death of Willie Johnson was that [Ross] struggled with Johnson …for possession of a handgun as it discharged wildly and randomly as they fought." *Appellant's Brief* at 9. Ross argues that, at most, he was guilty of acting recklessly or in sudden heat.

Ross was charged with knowingly or intentionally killing Johnson. To kill knowingly is to engage in conduct with an awareness that the conduct has a high probability of resulting

in death. *Lewis v. State*, 740 N.E.2d 551 (Ind. 2000); I.C. § 35-41-2-2 (West 2004). Further, as set forth above, intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death or great bodily harm. *Kiefer v. State*, 761 N.E.2d 802. *See also Heavrin v. State*, 675 N.E.2d 1075, 1079 (Ind. 1996) ("one is presumed to have intended the reasonable results of his or her own acts").

After shooting Moffett twice, Ross shot Johnson five times. Several of these shots occurred during the struggle with Johnson. The evidence favorable to the verdict, however, reveals that the fatal shot to Johnson's neck occurred after the struggle when Ross was getting ready to leave and Johnson tried to get up off the floor. Further, soon after the shooting, Ross indicated to a friend that he had murdered someone and shot another. He then asked his friend to provide him with an alibi. We conclude that the jury was presented with ample evidence that Ross acted knowingly or intentionally when he killed Johnson.

In the alternative, Ross claims the evidence overwhelmingly establishes he acted in sudden heat. In this regard, he notes that he was boozed up and agitated at what he perceived as a lack of respect for Baker.

Sudden heat is a mitigating factor that reduces otherwise murderous conduct to voluntary manslaughter. It requires "sufficient provocation to engender passion, which is demonstrated by anger, rage, sudden resentment, or terror that is sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection." *Boone v. State*, 728 N.E.2d 135, 138 (Ind. 2000). Evidence of anger alone does not establish sudden heat. *See Matheney v. State*, 583 N.E.2d

1202 (Ind. 1992). In the instant case, the State presented sufficient evidence to support the jury's determination that the killing was not the result of sudden heat.

3.

Ross next argues that the trial court erred when it denied his motion for a mistrial. He made the motion during the State's final argument after the prosecutor inadvertently displayed unredacted cell phone records referring to Ross as "Ghetto Godfather" in violation of a motion in limine. He claims the term "Ghetto Godfather" suggests a connection to criminality and to gang-related activity.[6]

In reviewing a claim of prosecutorial misconduct, we determine whether the prosecutor engaged in misconduct, and if so, whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he should not have been subjected. *Cooper v. State*, 854 N.E.2d 831 (Ind. 2006). The gravity of peril turns on the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. *Id.* "Absent clear error and resulting prejudice, the trial court's determination of violations and sanctions will be affirmed." *Overstreet v. State*, 783 N.E.2d 1140, 1155 (Ind. 2003). Further, a mistrial is an extreme remedy granted only when no other method can rectify the situation. *Overstreet v. State*, 783 N.E.2d 1140.

In the instant case, the record reveals that the unredacted documents were inadvertently displayed to the jury for only a brief period of time, while other nonoffensive

[6] To the extent Ross's claim is based on the erroneous admission of evidence, we observe that no evidence was admitted during the State's closing argument. Further, it is undisputed that the cell phone records were properly redacted when they were admitted into evidence.

portions of the documents were being highlighted by the prosecutor. Under the circumstances, it is unlikely that the jury even noticed the references to "Ghetto Godfather" on the documents. Even if noticed, Ross has failed to establish that said references placed him in a position of grave peril that was not rectified by the trial court's curative instruction to the jury to disregard any distinction between the slides displayed by the prosecutor and the exhibits admitted during trial. The trial court did not err in denying the motion for mistrial.

4.

Finally, Ross challenges his consecutive, advisory sentences as inappropriate. Though difficult to follow, his argument appears to be that consecutive sentences were inappropriate because, when imposing advisory sentences, the trial court found that the mitigating and aggravating circumstances balanced.

We have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. *See* Ind. Appellate Rule 7(B); *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Although we are not required under App. R. 7(B) to be "extremely" deferential to a trial court's sentencing decision, we recognize the unique perspective a trial court brings to such determinations. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Thus, "we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*. Moreover, we observe that Ross bears the burden of persuading this court that his sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867.

Here, the trial court imposed advisory sentences for Ross's murder and attempted murder convictions and ordered the sentences to be served consecutively. The trial court explained that consecutive sentences were proper because Ross was on home detention and probation (for a felony handgun offense) at the time of the shootings and because there were two victims. We find nothing inappropriate with the trial court's decision to impose consecutive sentences.[7] *See Estes v. State*, 827 N.E.2d 27, 29 (Ind. 2005) ("Estes committed the offenses against two victims, so at least one consecutive sentence is appropriate"); *Serino v. State*, 798 N.E.2d 852, 857 (Ind. 2003) ("consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person").

Judgment affirmed.

DARDEN, J., and BARNES, J., concur

[7] With respect to the probation violation, Ross also challenges the revocation of his previously suspended sentence as inappropriate. A trial court's action in a probation revocation proceeding, however, is not a criminal sentence as contemplated by Rule 7(B) and, thus, the rule is inapplicable. *Jones v. State*, 885 N.E.2d 1286 (Ind. 2008).